No. 16-5294

IN THE

Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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American Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003) 17

American Psychiatric Ass'n, *The Principles of Medical Ethics, With Annotations Especially Applicable to Psychiatry* (2013), https://www.psychiatry.org/psychiatrists/practice/ethics 12-13, 14

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Emily J. Gorendyke, Ake v. Oklahoma*: Proposals for Making the Right a Reality,* 10 N.Y.U. J. Legis. & Pub. Pol'y 367 (2007) 8

Matthew T. Huss, *Forensic Psychology: Research, Clinical Practice, and Applications* (2009) 15

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National Institute of Mental Health, *Inmate Mental Health*, http://www.nimh.nih.gov/health/statistics/prevalence/inmate-mental-health.shtml (last visited Aug. 18, 2016) 3

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INTERESTS OF AMICUS CURIAE[1]

The Constitution Project ("TCP") is an independent, not-for-profit organization that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues, such as the right to counsel in criminal trials. TCP achieves its goals through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. TCP is deeply concerned with the preservation of fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. TCP frequently appears as *amicus curiae* before this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues.

TCP's National Right to Counsel Committee ("Committee") is a bipartisan collective of independent experts representing all segments of America's justice system. Established in 2004, this blue-ribbon committee includes Democrats and Republicans, former judges, prosecutors, defense lawyers, victim

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[1] Pursuant to Rule 37.2, *amicus* notified counsel of record for all parties of its intent to file an *amicus* brief. Consent was timely requested, and the parties' written consent to this filing accompany this brief. Pursuant to Rule 37.6, *amicus* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* and their counsel made a monetary contribution to its preparation or submission.

advocates, and others. The Committee's mission is to examine, across the country, whether criminal defendants and juveniles charged with delinquency, who are often unable to retain their own lawyers, receive adequate legal representation. A list of the Committee's membership is attached hereto at the Appendix.

The Committee spent several years examining the ability of state courts to provide adequate counsel to individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its seminal report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which included the Committee's findings on the right to counsel nationwide, and based on those findings, made 22 substantive recommendations for reform. As relevant here, the Committee emphasized that, commensurate with their obligation under *Gideon v. Wainwright*, states must ensure access to independent experts to assist the indigent accused. *Justice Denied* has garnered public praise from a wide array of public figures, and it has been cited in a variety of national news publications, state newspapers, and court opinions.

SUMMARY OF ARGUMENT

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Court determined that indigent defendants are entitled under the Due Process clause to the assistance of a mental health professional in cases where that assistance is

necessary to assure the defendant meaningful access to justice. Principles of fundamental fairness require it, and "the promise of *Gideon* that a criminal defendant has a right to counsel at trial would be a futile gesture," *Evitts v. Lucey*, 469 U.S. 387, 397 (1985), without it. The entitlement to a mental health expert under *Ake* thus demands that the expert be dedicated to the defendant, and committed to assisting in the defense. Only with a dedicated mental health expert is a criminal defendant likely able to establish the confidential relationship that is a fundamental precondition to obtaining the most accurate and reliable mental health assessment possible. That is one reason why any non-indigent criminal defendant would hire a confidential, dedicated expert, and is why *Ake* requires access to the same confidential, dedicated expert for indigent criminal defendants.

The current split in judicial authority over what the Due Process clause and *Ake* require has created two starkly different legal and clinical environments for indigent criminal defendants. Thousands of indigent criminal defendants have mental health conditions that bear on their culpability or sentence.[2] But depending

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[2] *See* Doris J. James & Lauren E. Glaze, Bureau of Justice Statistics, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* 1 (2006) (as of 2005, "56% of State prisoners, 45% of Federal prisoners, and 64% of jail inmates" "had a mental health problem"), http://www.bjs.gov/content/pub/pdf/mhppji.pdf; *see also* Nat'l Inst. Of Mental Health, *Inmate Mental Health*, http://www.nimh.nih.gov/health/statistics/prevalence/inmate-mental-health.shtml (last visited Aug. 18, 2016); Cara H. Drinan, *The Revitalization of* Ake*: A Capital Defendant's Right to Expert*

on where they are tried, they participate in what is, in effect, two very different systems. In one, both non-indigent and indigent criminal defendants have access not only to the actual assistance of a dedicated mental health expert but also, and as a consequence, to a mental health assessment conducted with the confidentiality necessary to ensure for the trier of fact the accuracy and reliability of the assessment. In the other, only an indigent (as opposed to non-indigent) criminal defendant's mental health is examined and assessed in a more inquisitorial setting – in a way that is almost uniquely anomalous in our adversarial system of justice – which lacks the confidentiality that best ensures the accuracy and reliability of the assessment. The Court should grant the Petition in this case and resolve the legal disagreement that has given rise to these two very different clinical realities for thousands of criminal defendants nationwide.

ARGUMENT

I. An Indigent Defendant Must Have Access to a Dedicated Mental Health Professional in Order for that Entitlement to be Meaningful in an Adversarial System.

The holding in *Ake v. Oklahoma* was an expansion of preceding due process cases that had gradually but consistently expounded upon the "elementary

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Assistance, 60 Okla. L. Rev. 283, 302 (2007) ("Although estimates vary, some sources indicate that as many as 70 percent of death-row inmates suffer from some form of schizophrenia or psychosis" (quoting Brief for Respondent at 40, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407))).

principle" that the Due Process Clause protects the rights of indigent defendants to have the same opportunity for fair representation as affluent defendants. 470 U.S. at 76. By the time the Court decided *Ake*, it had "long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Id.*; *see also, e.g.*, *Medina v. California*, 505 U.S. 437, 444-45 (1992) (understanding *Ake* as an expansion of earlier due process cases).[3]

This principle of "fundamental fairness" developed out of the Court's "belief that justice cannot be equal where, simply as a result of his poverty, a defendant is

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[3] *See Powell v. Alabama*, 287 U.S. 45, 71-73 (1932) (right of indigent defendants incapable of adequately defending themselves to state-provided defense attorneys in capital cases); *Griffin v. Illinois*, 351 U.S. 12 (1956) (right of indigent noncapital defendants to appeal without paying for trial transcripts); *Burns v. Ohio*, 360 U.S. 252 (1959) (right of indigent defendants to file an appeal without being required to pay a fee); *Smith v. Bennett*, 365 U.S. 708, 713-14 (1961) (right of indigent defendants to access writ of habeas); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right of indigent defendants to counsel at trial in noncapital cases); *Douglas v. California*, 372 U.S. 353 (1963) (right of indigent defendants to counsel in first appeal as of right); *Lane v. Brown*, 372 U.S. 477 (1963) (rejecting screening procedures used to reduce frivolous appeals by indigents); *Draper v. Washington*, 372 U.S. 487 (1963) (same); *In re Gault*, 387 U.S. 1, 41 (1967) (right of indigent juveniles to appointed counsel); *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (right of free transcripts on appeal extended to non-felons); *Strickland v. Washington*, 466 U.S. 668 (1984) (right to effective assistance of counsel); *Evitts v. Lucey*, 469 U.S. 387 (1985) (same).

denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake*, 470 U.S. at 76; *see Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). This is not to say that the State must purchase for an indigent defendant "all of the services that the wealthy may buy." *Johnson v. Oklahoma*, 484 U.S. 878, 880 (1987) (citing *Ross v. Moffitt*, 417 U.S. 600, 616 (1974)). To be sure, *Ake* did not grant "a constitutional right to choose a psychiatrist of [the defendant's] personal liking or to receive funds to hire his own." 470 U.S. at 83. But the State does have an obligation to "provide the defendant with the 'basic tools of an adequate defense.'" *Johnson*, 484 U.S. at 880 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)). Under *Ake*, those "basic tools" must include the assistance of a mental health expert when one is necessary. 470 U.S. at 82-83.

The expansion over time of the due process rights of indigent defendants has served to ensure that those defendants obtain *meaningful* access to justice. *See Ake*, 470 U.S. at 77. "[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process." *Id.* State proceedings against an indigent defendant are "fundamentally unfair" unless the State "mak[es] certain that [the defendant] has access to the raw materials integral to the building of an effective defense." *Id.* In cases turning on issues of mental health, meaningful access to justice requires access to a mental health professional who is dedicated to the defendant. It is not sufficient that a state

provide access only to a single, non-confidential expert working equally for the prosecution as well as the defense.

Indeed, for an indigent defendant's access to justice to be meaningful as the Court has prescribed, the defendant must "have a reasonable chance of success" against the prosecution. *Ake*, 470 U.S. at 83. This necessarily contemplates the competing interests between the defendant and the prosecution intrinsic in our adversarial system. Indeed, *Ake* tells us that in order to protect a defendant's due process rights, a mental health professional must be made available to the defendant for the purpose of providing assistance to the defendant *for the defense*. *Id.* ("[T]he State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.").[4] As Justice Marshall wrote several years after writing for the Court in *Ake*, an indigent defendant's "right to psychiatric assistance is not satisfied by provision of a psychiatrist who must report to both parties and the court." *Graviel v. Texas*, 495 U.S. 963, 965 (1990) (Marshall, J., dissenting from denial of certiorari); *see also Vickers v. Arizona*, 497 U.S. 1033, 1036 (1990) (Marshall, J., dissenting from denial of certiorari) ("*Ake* requires the appointment of a psychiatrist who will assist in the preparation of the

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[4] This includes, specifically, at the sentencing phase. *See Ake*, 470 U.S. at 84 ("[D]ue process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.")

defense, not one who will merely give an independent assessment to the judge or jury."). Even Justice Rehnquist's dissent in *Ake* confirms that, at the very least, what "the defendant should be entitled to" under *Ake* is access to "a psychiatrist who acts independently of the prosecutor's office." 470 U.S. at 92 (Rehnquist, J., dissenting); *see also Tuggle v. Netherland*, 516 U.S. 10, 12 (1995) (per curiam) ("[D]ue process requires that the State provide the defendant with the assistance of an independent psychiatrist.").

The necessity of a dedicated expert is made clear when one considers the defendant's potential need or desire to conduct a cross-examination of the State's mental health expert. "[A] state witness unbalanced by a defense expert testifies from an initially and unashamedly partisan stance," and "can offer testimony that is valid, but debatable—even inaccurate or false—while the defendant has no chance to counter the testimony and little ability to mount an effective cross-examination." Emily J. Gorendyke, Ake v. Oklahoma: *Proposals for Making the Right a Reality*, 10 N.Y.U. J. Legis. & Pub. Pol'y 367, 388 (2007). Even a truly neutral expert may "penalize the defendant by presenting a single view of the evidence to the jury, while the defense attorney will not have the knowledgeable assistance necessary to prepare an effective cross-examination." *Id.*

This Court has previously recognized the harm that results when a mental health assessment by the State goes unbalanced or unchallenged. In *Tuggle*, for example, the failure to provide an indigent defendant with the assistance of an independent psychiatrist

"prevented [the defendant] from developing his own psychiatric evidence to rebut the [prosecution's] evidence and to enhance his defense in mitigation." 516 U.S. at 13. This left the prosecution's evidence unchallenged, "which may have unfairly increased its persuasiveness in the eyes of the jury." *Id.* Accordingly, the Court acknowledged that "the absence of such evidence may well have affected the jury's ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment." *Id.* at 14. Likewise, the Court noted in *Ford v. Wainwright* that "without any adversarial assistance from the prisoner's representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information." 477 U.S. 399, 414 (1986). The consequence could not be more clear, or more dire: "The result is a much greater likelihood of an erroneous decision," *id.*

Accordingly, to the extent that *Ake* contemplates giving indigent defendants access to a mental health expert, it necessarily envisions such an expert working with the defense to assist in opposing the prosecution and any prosecution mental health expert. *Ake* consistently discusses a system of "psychologists for each party"—the defense and the prosecution—who present their "differences in opinion" for the jury to resolve. 470 U.S. at 81. The appointed defense expert thus serves the role of, among other things, "offer[ing] a well-informed . . . opposing view," and "rais[ing] in

the jurors' minds questions about the State's proof of an aggravating factor." *Id.* at 84. This approach ensures an indigent defendant's basic right to participate in our adversarial legal system, and reflects what is necessary for that process to be fair. Indeed, the Due Process Clause "speak[s] to the balance of forces between the accused and his accuser," *Wardius v. Oregon*, 412 U.S. 470, 474 (1973), because "our adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interest," *Lassiter v. Department of Social Services*, 452 U.S. 18, 28 (1981).

The federal courts of appeals are deeply divided on the question of whether *Ake* and the Due Process Clause require (1) a confidential mental health expert dedicated to the defense, or (2) a mental health expert equally available to the defense, the prosecution, and the court.[5] This Court's intervention is urgently needed to ensure that *Ake* and the Due Process Clause are followed and implemented consistently on a nationwide basis.

II. A Confidential Relationship with the Mental Health Expert Is Critical to Ensuring the Accuracy and Reliability of the Mental Health Assessment.

In *Ake*, itself, the Court acknowledged the importance of the accuracy of the mental health examination, emphasizing that "[t]he private interest in

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[5] A full discussion of the split among the United States Courts of Appeals can be found in the Petition at 11-16.

the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling," 470 U.S. at 78, and that "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense . . . the risk of an inaccurate resolution of sanity issues is extremely high," *id.* at 82. Indeed, the State's "interest in the fair and accurate adjudication of criminal cases" weighs against even "[t]he State's interest in prevailing at trial." *Id.* at 79.

It has long been recognized that the accuracy of any mental health examination depends fundamentally on the patient's being candid and frank with the professional conducting the examination. The personal evaluation of a defendant "may not yield an adequate clinical base if legal and other situational factors impede unrestricted and undistorted communication." Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427, 496-97 (1980); *see also United States v. Leonard*, 609 F.2d 1163, 1165-66 (5th Cir. 1980) ("[T]he psychiatric inquiry cannot succeed unless the defendant cooperates; a defendant's mental condition would not be discovered in many instances unless the psychiatrist can engage in a candid conversation with the defendant about it.").

A mental health evaluation by an expert often includes "an accurate medical, developmental, psychological and social history," a "physical and neurological examination," a "psychiatric and mental status examination," "diagnostic studies," and any

additional specialized tests. Douglas S. Liebert & David V. Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15 Am. J. Forensic Psychiatry 43, 46 (1994).[6] For mental health experts engaged to evaluate criminal defendants, capturing the full scope of clinically relevant information is no less essential. It is critical that the clinician collect "[a]n adequate social, developmental and medical history" in order to conduct a mental health evaluation, a step which "has been called the 'single most valuable element to help the clinician reach an accurate diagnosis.'" *Id.*[7]

When an indigent criminal defendant is unable to be candid with an examining mental health expert, however, the expert will not be able to conduct this most critical assessment. "If the legal system values a thorough forensic evaluation, it must encourage the defendant's full cooperation." Bonnie & Slobogin, 66 Va. L. Rev. at 497. In turn, the defendant's full participation and cooperation requires the existence of a confidential relationship between the defendant and the expert clinician. Confidentiality is a fundamental touchstone of the relationship between a mental health professional and her clients. *See* Am. Psychiatric Ass'n, *The Principles of Medical Ethics, With Annotations*

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[6] Available *at* http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1994_mental_health.authcheckdam.pdf.

[7] Quoting HI Kaplan & BJ Sadock: *Comprehensive Textbook of Psychiatry* (4th ed. 1985).

Especially Applicable to Psychiatry 6 (2013)[8] ("Confidentiality is essential to psychiatric treatment."); Am. Psychol. Ass'n, Psychology Help Center: *Protecting your privacy: Understanding confidentiality*[9] ("Psychotherapy is most effective when you can be open and honest.").

As this Court recognized in acknowledging a psychotherapist-patient privilege, "a psychiatrist's ability to help her patients 'is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality.'" *Jaffee v. Redmond*, 518 U.S. 1, 10-11 (1996) (quoting Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, *Confidentiality and Privileged Communication in the Practice of Psychiatry* 92 (June 1960)) (alterations in *Jaffee*)). Indeed, Courts have long acknowledged that "a psychiatrist must have his patient's confidence or he cannot help him." *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955); *see also Caesar v. Mountanos*, 542 F.2d 1064, 1067 (9th Cir. 1976) ("[P]sychotherapy is . . . dependent on absolute confidentiality.").

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[8] *Available at* https://www.psychiatry.org/psychiatrists/practice/ethics.

[9] *Available at* http://apa.org/helpcenter/confidentiality.aspx (last visited Aug. 18, 2016).

Professional ethical standards for mental health clinicians likewise reflect the fundamental underpinning of confidentiality in their practice. Psychologists, for example, "have a primary obligation . . . to protect confidential information" obtained from a client. Am. Psychol. Ass'n, *Ethical Principles of Psychologists and Code of Conduct, Standard 4: Privacy and Confidentiality*, 4.01 Maintaining Confidentiality (2010).[10] Disclosure is only permitted with the client's consent or if it is required or permitted by law. *Id.*, 4.05 Disclosures. Likewise for psychiatrists. *See* Am. Psychiatric Ass'n, *The Principles of Medical Ethics* 6 ("A psychiatrist may release confidential information only with the authorization of the patient or under proper legal compulsion."). The same code of professional conduct applies to mental health professionals who provide their expertise in connection with legal proceedings. Forensic clinicians practice under the same "ethical obligations to maintain the confidentiality of information relating to a client or retaining party" and with the same rules regarding disclosure. Am. Psychol. Ass'n, *Specialty Guidelines for Forensic Psychology*, 68 Am. Psychologist 7, 14 (2013).[11]

When there is a lack of confidentiality, however – as with a mental health expert answering equally to defense and prosecution alike – the clinician faces an

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[10] *Available at* http://www.apa.org/ethics/code/.

[11] *Available at* http://www.apa.org/practice/guidelines/forensic-psychology.pdf.

ethical dilemma because the lack of confidentiality conflicts with "obtaining information in an open and honest manner." Matthew T. Huss, *Forensic Psychology: Research, Clinical Practice, and Applications* 66 (2009). The forensic evaluator knows that "the assessment will be more accurate if the information he obtains from the parties involved is believed to be confidential," because if the client "believes that everything she discusses is confidential, she will be more likely to reveal information that is harmful to her legally [but also] potentially relevant to the evaluation." *Id.*; *see also* 1 Cyril H. Wecht, *Forensic Sciences* § 21.05(e) (Matthew Bender 2016) (discussing the "inhibiting effect" of the lack of confidentiality in a forensic evaluation). But the clinician must be clear about the lack of confidentiality in the evaluation, despite the diminished quality of assessment that will result as a consequence of that clarity. Huss, *Forensic Psychology* at 66. The American Bar Association has acknowledged this ethical dilemma, and warns that a client may become "unduly trustful" if the clinician weighs reaching a more accurate assessment over the need to be absolutely clear that the content of the evaluation will not be kept confidential. Am. Bar Ass'n, *ABA Criminal Justice Mental Health Standards*, Standard 7-1.1 *Commentary* (1989).

It is thus widely accepted that "[t]he most powerful legal disincentive to full disclosure is the defendant's fear that what he says during the forensic evaluation will be used against him in court." Bonnie & Slobogin, 66 Va. L. Rev. at 497. And it is equally clear that the

assessment of a non-dedicated clinician's assessment will be inhibited, and thus less accurate, because of the lack of confidentiality in the clinician's relationship with the defendant. Absent the accuracy that only a confidential clinical relationship can best ensure, mental health experts cannot render the meaningful assistance that *Ake* guarantees or the reliability to which the triers of fact should be entitled.

And only with an expert dedicated to assisting the defense through a confidential examination can the defense make an informed decision whether to relinquish the right to confidentiality by having the expert testify, or instead forego presenting the expert and utilize the expert to prepare its cross-examination of the prosecution experts, depending on which alternative is in the client's best interests. This informed decision cannot be made by the client alone. Rather, it must be made after the client has a confidential relationship with the expert and the expert then consults with the defense following the evaluation.

Ake entitles indigent defendants to an approximation of the mental health assistance available to non-indigent defendants. Non-indigent defendants are able to afford dedicated, confidential experts, and benefit accordingly from the confidentiality and accuracy of the assistance they can provided. Indeed, it hardly needs stating that, where a criminal defendant has financial means, no defense attorney would rely on a non-confidential mental health expert made equally available to the prosecution and the court. Due Process thus requires that indigent criminal defendants not be so limited. "Counsel should have the right to protect

the confidentiality of communications with the persons providing such [expert] services to the same extent as would counsel paying such persons from private funds." *Am. Bar Ass'n Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 952 (2003) (Guideline 4.1(B)(2)). This can be achieved only where *Ake* is properly understood to entitle indigent defendants to a dedicated, confidential mental health expert.

CONCLUSION

The petition for writ of certiorari should be granted.

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APPENDIX

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